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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 31, 1999

Ms. Magalie Roman-Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

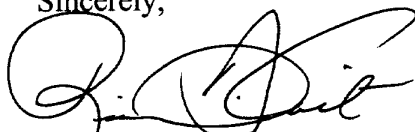
Re: CC Docket # 96-45
In the Matter of
Western Wireless Corporation's Petitions for Preemption
of an Order of the South Dakota Public Utilities Commission

Dear Ms. Roman-Salas:

Enclosed please find one original and four copies of the Comments of the South Dakota Independent Telephone Coalition, Inc. in reference to CC Docket No. 96-45, in response to Public Notice DA 99-1356. In accordance with the instructions in the Public Notice, three copies have also been sent to Sheryl Todd and an electronic disk copy has been sent to the Commission's copy contractor, International Transcription Service.

Thank you for your assistance.

Sincerely,



Richard D. Coit
Executive Director and
General Counsel

Attachments

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Western Wireless Corporation's Petition for
Preemption of An Order of the South Dakota
Public Utilities Commission

CC Docket No. 96-45

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**COMMENTS OF
SOUTH DAKOTA INDEPENDENT
TELEPHONE COALITION, INC.**

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August 31, 1999

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I. INTRODUCTION

The South Dakota Independent Telephone Coalition, Inc. ("SDITC") submits these comments in opposition to the petition for preemption filed by Western Wireless Corporation ("Western Wireless") in the above captioned proceeding. Through such petition, Western Wireless challenges and asks this Commission to preempt a decision of the South Dakota Public Utilities Commission ("SDPUC") denying a request made by Western Wireless for eligible telecommunications carrier status throughout the entire State of South Dakota. These comments are presented pursuant to and in accord with the Commission's Public Notice, DA 99-1356, released herein on July 19, 1999 and its Order, DA 99-1535, released on August 4, 1999, revising the established comment periods.

SDITC is an organization representing the interests of numerous independent, cooperative and municipal local exchange carriers in the State of South Dakota (attached as Appendix A hereto is a listing of the current SDITC member LECs). All of the SDITC member LECs are "rural telephone companies" as defined in 47 U.S.C. § 3(37) and all have been designated eligible telecommunications carriers by the SDPUC within their established rural service areas or "study areas". As such, all of the SDITC member companies are interested in and stand to be impacted by the outcome of this proceeding. SDITC was granted intervening party status in the underlying SDPUC proceedings and was a full participant in the proceedings.

II. SUMMARY

Western Wireless with its petition for preemption seeks federal preemption of a SDPUC decision dated May 19, 1999, which denied the company's request for statewide ETC designation.¹ Western Wireless argues in its petition that that the SDPUC decision should be

¹ *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Docket TC98-146, Findings of Fact and Conclusions of Law;

preempted on two grounds: (1) because it effectively precludes new entrants from providing universal service in high-cost areas and, as such, violates Section 253 of the Federal Telecommunications Act of 1996 (hereinafter referenced as "the Act"); and (2) because it conflicts with other provisions in the Act which are intended to promote local exchange service competition.

Federal case authorities have established that the preemption of state law by a federal administrative agency should be viewed as an extremely grave matter. It is a drastic step that should only be taken where Congress has provided a "clear statement" of its intent to displace state authority. In addressing previous cases for preemption involving interpretation and application of the Federal Telecommunications Act, the Commission has been mindful of these authorities and taken its task of reviewing preemption claims very seriously. The Commission has proceeded based on a presumption against preempting state regulation and has imposed the burden to prove preemption on the petitioning party. The Commission has further made it clear that satisfying this burden of proof requires more than conclusory statements and unsupported assertions.

The claims of Western Wireless for federal preemption of the SDPUC's decision denying it ETC status are completely without merit and are based on nothing more than misrepresentations of the SDPUC's findings and conclusions and exaggerations as to the effect that the SDPUC's decision will have on other requests for ETC designation. The SDPUC in denying Western Wireless ETC status issued a comprehensive set of findings and conclusions. These findings and conclusions, contrary to what Western Wireless suggests, reflect a careful analysis and resolution of the company's petition for ETC designation based on the actual evidence presented. It is wrong for Western Wireless to suggest that the SDPUC's decision was

Notice of Entry of Order. A copy of the SDPUC order is attached to the Western Wireless Petition for Preemption as Appendix A (hereinafter referenced as "SDPUC Order").

predicated on an improper interpretation of the federal ETC provisions. The SDPUC's decision was not the result of any faulty interpretation of the law. Western Wireless was denied ETC status simply because it failed to offer evidence indicating that it had anything more than a future plan to offer the required ETC services.

Western Wireless, in an attempt to support its claims for preemption, offers an interpretation of the federal ETC provisions that would effectively rewrite the provisions of 47 U.S.C § 214(e) and require carriers seeking ETC status to show only a "capability" and "commitment" to offer all of the services supported by federal universal service funding. SDITC does not believe the Western Wireless interpretation has any support under the federal law. And, even based on the interpretation offered by Western Wireless, the facts presented would not support ETC designation.

Western Wireless first seeks preemption under 47 U.S.C. § 253. The company claims that the SDPUC decision denying it ETC status in effect prohibits it from competing in rural and high-cost areas. In order to establish any "effective" prohibition proscribed by the provisions of Section 253(a), this Commission has previously determined that a factual showing of inability is required. Western Wireless generally states throughout its petition that it is impossible for the company to compete without first being designated an ETC, yet the company offers no real evidence supporting these claims of economic infeasibility. Without such evidence, this Commission must reject the Western Wireless claims of preemption under Section 253(a).

Because the SDPUC's decision does not violate the provisions of Section 253(a) of the Act, it is unnecessary to review the decision for purposes of determining whether it meets the standards set forth in Section 253(b) of the Act. SDITC challenges, however, the claims by Western Wireless that the decision is not competitively neutral and violates universal service principles. The SDPUC did not interpret or apply the federal ETC provisions found in Section 214(e) of the Act any differently when ruling on incumbent local exchange carriers ("ILEC")

ETC designations. All of the ILECs were required to seek ETC designation from the SDPUC before they could be eligible for any federal universal service support and all were required to show a “current” offering of the federally-supported services. The decision denying Western Wireless ETC status also cannot be found to violate the standards contained in Section 253(b) of the Act because of Section 253(f), which gives state commissions specific authority to impose ETC service requirements on any carrier seeking to provide local exchange services in rural telephone company service areas. Given the provisions of Section 253(f), there is no justification for any claim that the SDPUC decision, in requiring that Western Wireless show an actual or current offering of service, violated either the provisions of Section 253(a) or 253(b) of the Act.

The SDPUC's decision denying Western Wireless ETC designation is consistent with the specific language used in Section 214(e) of the Act. This Commission has never suggested that carriers can meet the ETC service requirements without showing that they are actually offering the required services. In the context of reviewing any ETC petition under the ETC criteria set forth in Section 214(e), State Commissions should be concerned as to precisely when the carrier applying for ETC status will make its services available to consumers. In order to show that has made an “offer” of the required services as contemplated under Section 214(e), a carrier petitioning for ETC designation should be able to show that it is in a position to actually provide such services within a reasonable period of time. The provisions of Section 214(e)(1) which require an “offer” of the required services “throughout the service area for which designation is received” do not indicate that it is sufficient for an ETC to merely show ability to comply at some undetermined future date. Accordingly, there is absolutely no merit to the Western Wireless claim that carriers requesting ETC status can satisfy the federal ETC requirements by simply promising prospective compliance.

As a second ground for preemption, Western Wireless alleges that the SDPUC decision denying it ETC status conflicts with or “thwarts and impedes the accomplishment of the federal interest in promoting local competition in rural and high-cost areas.” This ground for preemption must also fail because there is no cause for alleging preemption based on a conflict between the SDPUC decision and provisions of the Federal Act given the recent U.S. Fifth Circuit Court of Appeals decision in Texas Office of Public Utility Counsel, et al. v. FCC, No. 97-60421, issued July 30, 1999. The Fifth Circuit Court has reversed that portion of the Commission’s First Report and Order on Universal Service, FCC 97-157, which prohibited the states from imposing any additional requirements on carriers seeking eligibility for federal universal service support. Furthermore, aside from any affect that the Fifth Circuit Court’s decision has on this proceeding, there is no merit to the claims of Western Wireless that the SDPUC decision conflicts with or “thwarts and impedes” federal goals. The provisions of Section 214(e) of the Act must be applied and interpreted in a manner consistent with actually achieving federal universal service goals. Accordingly, the SDPUC in reviewing the Western Wireless request for ETC status interpreted the federal ETC provisions to require, in fact, an “offer” of all of the required ETC services throughout the relevant ILEC service areas. The SDPUC’s decision, as such, is entirely consistent with and does not conflict with the federal law.

III. BACKGROUND

On or about August 25th, 1998, GCC License Corporation, doing business in South Dakota as Cellular One, filed a petition with the SDPUC requesting designation as an Eligible Telecommunications Carrier (“ETC”) pursuant to Section 214(e)(2) of the Federal Communications Act. In seeking ETC designation, GCC License Corporation (“GCC”) effectively requested designation on a statewide basis. Specifically, GCC sought designation for all exchange areas located within all counties of the State, including the exchange areas of all

incumbent LECs (US WEST Communications, Inc. and all rural telephone companies). GCC License Corporation (“GCC”) is described in the Western Wireless petition for preemption filed with this Commission as a “wholly-owned subsidiary” of the Western Wireless Corporation.²

A hearing on GCC’s petition for ETC status was held by the SDPUC on December 17, 1998. Prefiled written testimony of the parties, along with live testimony, was presented at the hearing. Testimony presented by GCC at the hearing indicated that the company currently provides mobile cellular service in South Dakota through Commercial Mobile Radio Services (“CMRS”) licenses held throughout the State. It was specifically indicated, however, that GCC was not with its petition for ETC designation seeking universal service funding for its conventional cellular service.

GCC made it clear, through various statements that it is was not seeking universal service support for the provisioning of its mobile cellular services. GCC’s testimony indicated that GCC would provide universal service to consumers in South Dakota by using its CMRS spectrum to provide a fixed wireless local loop service. GCC described throughout its testimony a “proposed universal service offering” that would be provided through the use of “fixed wireless local loops.” The service offering would be provided, according to GCC, through its existing network infrastructure and “high gain antennas and network equipment at customer locations.” GCC stated that its’ cellular network was “designed to serve mobile customers” and that in order “to optimize voice quality for its universal service customers, GCC would have to construct additional antenna towers, as necessary, and would have to install fixed wireless network equipment (antennas and transmitters) at customer locations. GCC specifically indicated that it would “use available universal service support for the provision of a wireless local loop service.” GCC’s witness at the SDPUC hearing testified that he didn’t understand how his company could

² Within these comments, because the SDPUC’s decision was issued specific to GCC License Corporation, Western Wireless may also be referred to as GCC.

realistically get universal service customers if the service was provisioned as a cellular service offering. He also indicated very clearly that customers would want a fixed wireless service – that without such service GCC would not be able to give consumers “dialtone.”

GCC’s fixed wireless local loop service was described as the means by which GCC would make a “universal service offering” available to South Dakota consumers. Yet, at the time of the SDPUC hearing, this “universal service offering” was not, in fact, being offered or advertised by GCC to any customers in South Dakota. The fixed wireless service was described merely as a planned offering and few specifics concerning how the planned service would be offered were provided. GCC had not set any rate for the fixed wireless universal service offering and GCC had not received a certificate of authority from the Commission relating to any fixed wireless services. GCC’s witness testified that GCC was not currently providing telecommunications services by fixed wireless local loops to anyone in South Dakota. GCC throughout its testimony asserted merely that it would provide the supported services as part of its universal service offering or that it was capable of providing the supported services.

GCC presented evidence indicating that certain affiliate companies of GCC hold radio licenses to provide Local Multipoint Distribution Service (“LMDS”) and Personal Communications Services (“PCS”) in areas within South Dakota. These affiliates, however, were not at the time of the SDPUC hearing offering or providing any LMDS or PCS wireless services in this State.

On May 19, 1999, the SDPUC issued its decision on GCC’s petition requesting ETC designation. The SDPUC in denying ETC status to GCC determined that it must look at whether the fixed wireless system proposed by GCC meets the ETC requirements set forth in 47 U.S.C. § 214(e), not whether GCC’s existing mobile service provides all of the services supported by

universal service.³ This determination was made based directly on: (1) GCC's own statements that it was not seeking support for its cellular mobile services; and (2) the SDPUC's finding that it could not base its decision on whether to grant ETC status to GCC on GCC's current mobile cellular service because it was not sufficiently comparable to its proposed fixed wireless service.⁴ The SDPUC then concluded, based on the evidentiary record, that GCC was not actually offering or providing a universal service offering through a fixed wireless system and on this basis decided that it could not grant GCC's request for ETC status.⁵

IV. ARGUMENT

A. This Commission must start with a presumption against preemption under the federal law.

Western Wireless argues that the SDPUC's denial of statewide ETC status to GCC should be preempted on two grounds: (1) that the decision effectively precludes new entrants from providing universal service in high-cost areas and should therefore be preempted under Section 253 of the Act; and (2) that the decision should be preempted under "pre-1996 Act jurisprudence" because it violates explicit FCC policies, and "thwarts and impedes" the accomplishment of the federal interest in promoting local competition in rural and high-cost areas.

With regard to these claims of preemption, SDITC first points out that it is firmly established in our system of dual sovereignty between the federal and state governments, that the preemption of state law by a federal administrative agency is an extremely grave matter. The U.S. Supreme Court has repeatedly indicated that federal preemption of state law is a drastic step, which should be taken only where Congress has provided a "clear statement" of its intent to

³ SDPUC Order, Findings of Fact 8, 11, and 16.

⁴ Id. at Findings of Fact 7 and 8.

⁵ Id. at Findings of Fact 18 and 27 and Conclusions of Law 6 and 7.

displace State authority. Gregory v. Ashcroft, 501 U.S. 452, 464 (1991); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717 (1985).

The Supreme Court in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 at 654-655 (1995) stated:

Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law. See *Pacific Gas & Elec. Co. V. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), we have worked on the ‘assumption that the historic police powers of the State were not to be superseded by the Act unless that was the clear and manifest purpose of Congress. *Rice*, *supra*, at 230, See, *e.g. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

As this Commission has stated, “the ultimate question underlying any preemption analysis is whether Congress intended that federal regulation supersede state law”.⁶ “In many cases, federal statutes contain no explicit statements with respect to Congress’ preemptive intent, and courts and agencies must look to other sources to determine the extent, if any, to which Congress intended to displace law.”⁷

In addressing previous cases for preemption involving interpretation and application of the Federal Telecommunications Act, the Commission has taken its task of reviewing preemption claims very seriously and has required that such claims be supported by a significant showing.⁸

⁶ *Public Utility Commission of Texas Petitions for Declaratory Ruling and/or Preemption*, Memorandum Opinion and Order, FCC 97-346, ¶ 51, released October 1, 1997 (“Texas Preemption Order”).

⁷ *Id.*

⁸ See *e.g. California Payphone Association*, Memorandum Opinion and Order, FCC 97-251, released July 17, 1997 (“California Payphone Order”), and *Petition of Pittencrieff Communications, Inc.*, Memorandum Opinion and Order, FCC 97-343, released October 2, 1997.

The Commission has given recognition to the above-cited Supreme Court cases, which establish a presumption against preempting state regulation, and has imposed the burden to prove preemption on the petitioning party. Further, the Commission has made it clear that this burden of proof should not be taken lightly and that it requires more than conclusory statements and unsupported assertions.

B. The SDPUC Order is not based on any unreasonable interpretation of the federal ETC provisions but rests on the factual record, which clearly showed no offering of the federally supported services.

The claims made by Western Wireless for federal preemption of the SDPUC's Order denying it ETC status are completely without merit and are based purely on misrepresentations by Western Wireless of the SDPUC's findings and conclusions and exaggerations as to the effect that the SDPUC's decision will have on other requests for ETC designation.

The petition for preemption filed by Western Wireless is replete with statements that do not accurately reflect the SDPUC's written decision. Throughout its petition, Western Wireless suggests that the PUC has interpreted the federal ETC provisions (47 U.S.C. § 214(e)) to require that any competitive carrier, before it can be designated an ETC, must "match" or provide the "equivalent" of the incumbent LEC's universal service offering before it could receive ETC designation. For example, on page 10 of its petition Western Wireless states that "[i]n essence, the SDPUC interpreted Section 214(e) as requiring a new entrant to match the universal service offering of the ILEC with respect to features, coverage and price before it can even obtain ETC status" Also, on page 26 of its petition, Western Wireless states that "[t]he SDPUC denied Western Wireless ETC status based on a legal conclusion that carriers must be providing service ubiquitously, with no coverage gaps, at prices and other conditions resembling those of the ILECs, before they can be designated as ETCs." Other inaccurate statements concerning the PUC's findings and conclusions are made on pages 8, 11, 12, 17, 18, 19, 20, 21, and 22 of the

Western Wireless petition. All of these statements are unsupported by the SDPUC's Order and amount to misrepresentations of the Order. They indicate an attempt by Western Wireless to, in effect, fabricate a preemption claim.

The SDPUC in denying Western Wireless ETC status issued a comprehensive set of findings and conclusions. These findings and conclusions show that the SDPUC denied the request of Western Wireless for ETC status for the following reasons:

- Western Wireless specifically stated that it was not seeking universal service funding for the mobile cellular service that it currently provides.⁹
- With regard to its current mobile cellular services, Western Wireless failed to show that the services were sufficiently comparable to the proposed fixed wireless services that would be used for its universal service offering.¹⁰
- Because the universal service offering of Western Wireless would initially be based on a fixed wireless system, the SDPUC determined that it must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile service meets the requirements.¹¹
- Even if the existing mobile service could be considered, Western Wireless failed to show that its mobile service was able to offer all of the services that are supported by federal universal service support mechanisms throughout the state.¹²
- It was unclear from the record whether PCS or LMDS services would be used by Western Wireless to offer universal service to customers in South Dakota, and entities other than GCC, the company requesting ETC designation, were holders of the PCS and LMDS licenses.¹³
- Since Western Wireless was not currently providing any services through its fixed wireless system, the SDPUC found that it was impossible to determine whether the company would meet the ETC service requirements when it actually began to provide a universal service offering.¹⁴
- Even if the SDPUC could grant a company ETC status based on intentions to serve, the evidence failed to show that the fixed wireless service could be offered

⁹ SDPUC Order, Finding of Fact 7.

¹⁰ Id. at Finding of Fact 8.

¹¹ Id. at Findings of Fact 11 and 16.

¹² Id. at Finding of Fact 12.

¹³ Id. at Findings of Fact 13, 14 and 15.

¹⁴ Id. at Finding of Fact 19.

by Western Wireless to customers throughout South Dakota immediately after ETC designation.¹⁵

- Western Wireless had not yet finalized its planned universal service offering. This lack of a definite plan created questions as to whether the company had the ability to offer universal service based on a fixed wireless technology throughout the entire state.¹⁶

- The statements made by Western Wireless concerning pricing demonstrated no clear, financial plan to provision of fixed wireless service throughout the State. Western Wireless failed to show that it had a viable financial plan to provide fixed wireless service throughout South Dakota.¹⁷

- Western Wireless was not currently providing fixed wireless loops to any customer in South Dakota.¹⁸

- Western Wireless was not offering fixed wireless service nor advertising the availability of a fixed wireless service throughout South Dakota.¹⁹

An ETC must be actually offering or providing the services supported by the federal universal service mechanisms. Western Wireless was not currently offering the fixed wireless service to South Dakota customers and the SDPUC determined that it could not grant a company ETC status based solely on stated intentions to serve.²⁰

The findings and conclusions contained in the SDPUC's decision reflect a careful analysis and resolution of the Western Wireless petition for ETC designation based on the actual evidence presented. It is wrong for Western Wireless to suggest that the SDPUC's decision denying ETC status was predicated on an improper interpretation of the ETC provisions found in Section 214(e) of the Act. The SDPUC's decision did not hinge on any stretched interpretation of the federal law, but rather as clearly shown by the SDPUC's findings and conclusions, was the result of the evidence or lack of evidence presented by Western Wireless concerning its universal service offering.

¹⁵ Id. at Finding of Fact 22.

¹⁶ Id. at Finding of Fact 23.

¹⁷ Id. at Findings of Fact 24 and 25.

¹⁸ Id. at Finding of Fact 17.

¹⁹ Id. at Finding of Fact 18.

²⁰ Id. at Conclusion of Law 6.

Very simply, Western Wireless was denied ETC status because it failed to offer any evidence indicating that it had anything more than a future plan to commence offering, at an undetermined date, fixed wireless services in South Dakota. As noted above, Western Wireless at the time of the SDPUC hearing was not providing a fixed wireless service to any customer in South Dakota. It also had not yet determined enough specifics concerning its planned universal service offering to give the SDPUC sufficient information relating to all of the required ETC services. Further, it was admitted by Western Wireless that it had not yet done any advertising in South Dakota relating to its fixed wireless services. Under these facts, how could the SDPUC reasonably conclude that Western Wireless should receive ETC status? Western Wireless, in seeking ETC status, was asking for a statewide designation, yet in presenting its case it was unable to show that it was either providing or actually offering its fixed wireless service to a single customer in the State.

Under the federal ETC provisions, carriers seeking ETC designation should not be permitted to negotiate or bargain with the State Commission: “if you will designate us, then we will provide the supported services.”²¹ The SDPUC properly focused its review on whether

²¹ Section 214(e)(1) of the Federal Act provides:

ELIGIBLE TELECOMMUNICATIONS CARRIERS. – A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with Section 254 and shall, throughout the service area for which the designation is received – (A) offer the services that are supported by Federal universal service support mechanisms under Section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefore using media of general distribution.

Emphasis Added.

With regard to the designation of more than one ETC in any service area, 47 U.S.C. § 214 (e)(2) provides:

DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS. – A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an

Western Wireless at the time of the hearing was actually meeting the ETC service requirements. The SDPUC in denying Western Wireless' request for ETC status concluded that it could not grant a company ETC status based merely on intentions to serve. It insisted upon some evidence of a current offering of the required services and simply denied the Western Wireless request for lack of such evidence

Western Wireless, apparently, believes that the federal ETC provisions can be interpreted so casually as to permit ETC designation regardless of when the carrier seeking ETC designation actually offers the required telecommunications services. Western Wireless suggests that the FCC should effectively rewrite the language of Section 214(e), and rather than requiring an actual "offer" of the services "make it clear that under Section 214(e) a carrier should receive ETC designation if it shows that it has the capability to provide facilities-based universal service to customers in a service area, and that it has made a real commitment to extend service to additional customers throughout the area upon request."²²

With regard to this interpretation offered by Western Wireless, SDITC does not believe it is at all supported by the Act. Further, even based on this offered interpretation, it is difficult to see how the SDPUC could have granted Western Wireless statewide ETC status. If applied literally, the Western Wireless interpretation would require any carrier seeking ETC status to show that it has the "capability" to provide universal service and a "real commitment" to extend

eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Emphasis Added.

²² Western Wireless Petition for Preemption, p. 4.

service to all customers. The SDPUC, as illustrated by its findings and conclusions, was clearly not satisfied that the fixed wireless service proposed by Western Wireless could provide all of the federally supported telecommunications services.²³ It also doubted whether Western Wireless was capable of providing its fixed wireless service throughout the State.²⁴ The SDPUC findings indicate that Western Wireless presented only vague, undefined plans of a future universal service offering. Even the interpretation of Section 214(e) described by Western Wireless, suggest that some evidence of a specific or actual offering of service should be presented. It would be difficult to make any finding of “capability” or “commitment” absent such evidence.

The Act under Section 214(e)(2) delegates to State Commissions the responsibility to determine whether carriers applying for ETC status “offer” and “advertise” the required telecommunications services and thereby “meet” the ETC service requirements. The SDPUC fulfilled this fact-finding responsibility as described in the Act. It held an evidentiary hearing and after such hearing determined that the facts did not support granting Western Wireless ETC status. The findings of fact entered by the SDPUC provide unequivocal support for the SDPUC’s decision. These findings should be given full recognition in this federal process. There is absolutely no basis to conclude that the SDPUC misinterpreted the federal ETC provisions and that this resulted in an improper decision on Western Wireless’ petition for ETC designation.

C. Preemption of the SDPUC decision is not warranted under Section 253 of the Act.

Western Wireless argues that the SDPUC decision should be preempted under Section 253 of the Act. Section 253(a), generally, gives the FCC authority to preempt state rulings that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or

²³ SDPUC Order, Finding of Fact 19.

intrastate telecommunications service." These provisions are, however, subject to some limitation by Section 253(b) which maintains the ability of a State "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers."

Western Wireless contends that the SDPUC in denying Western Wireless statewide ETC status, and as a result denying access to federal universal service funds, has effectively prevented the company from entering or providing telecommunications services in high-cost areas within South Dakota. The SDPUC decision, according to Western Wireless, gives rise to a violation of Section 253(a) and is also not proper under Section 253(b) of the Act because it is not competitively neutral and does not preserve and advance universal service.

SDITC challenges this claim of preemption on the basis that it is neither supported by the SDPUC's decision nor the federal law. Contrary to what Western Wireless alleges, the SDPUC's decision does not in anyway impose an impermissible barrier to competitive entry.

1. The SDPUC decision does not have the effect of prohibiting Western Wireless from providing a telecommunications service.

In reviewing a preemption claim under the terms of Section 253(a) it is important to first identify the relevant market under consideration – the market that is allegedly subject to the prohibition on competitive entry. Western Wireless, by various statements, suggests that this Commission in analyzing its preemption claim should consider whether the SDPUC's decision precludes it from competing within "rural and high-cost" areas of South Dakota. SDITC does not agree that "rural and high-cost" areas, specifically, are the relevant markets for purposes of this review by the Commission under Section 253(a). The petition for ETC designation presented to the SDPUC was a request for statewide ETC status. It was not limited to any

²⁴ Id. at Findings of Fact 22-26.

individual ILEC service area or service areas. This being the case, the inquiry at this time would have to be limited to determining whether the SDPUC's decision prohibits Western Wireless from providing its services anywhere in South Dakota. The Commission cannot assume a hypothetical set of facts in reviewing the Western Wireless petition, but must review it based on the actual ETC request made to the Commission and the evidentiary record relating to that request. It would be improper to assume that if Western Wireless had presented an ETC request for a specific rural or high-cost service area, the SDPUC would have denied it ETC status. Western Wireless, by the SDPUC's decision, was denied statewide ETC status. It is that decision that defines the scope of this review process.²⁵

SDITC believes the relevant market for purposes of this review is the entire State of South Dakota, but regardless of what market area is considered, it is clear that Western Wireless has failed to meet its burden of proving that preemption is called for under Section 253(a).

Regarding the claim of preemption under Section 253(a) of the Act, it should first be noted that this is not a case involving any express legal prohibition on the ability of Western Wireless to provide telecommunications services within any service area in South Dakota. Western Wireless is not subject to any legal restrictions that serve as any sort of flat prohibition on its provisioning of telecommunications in South Dakota.²⁶ Western Wireless, like other carriers, is free to provide telecommunications services of any kind in any geographic area of the State,

²⁵ On page 18 of its Petition for Preemption, Western Wireless claims that the Commission could have designated it as an ETC in specific geographic areas of the State. With regard to this claim, it should be noted that Western Wireless did not at anytime amend its petition for ETC designation to request designation on less than a statewide basis.

²⁶ As such, this case is different from most other claims of preemption presented to the Commission under Section 253(a). See e.g. *New England Public Communications Council*, Memorandum Opinion and Order, FCC 96-470; *Classic Telephone Inc. Petition for Preemption*, Memorandum Opinion and Order, FCC 96-397, released October 1, 1996, ("*Classic Telephone Order*").

subject only to any SDPUC certification procedures and rural safeguards that may apply to the provisioning of its fixed wireless services.²⁷

Western Wireless is seeking preemption under Section 253(a) by claiming that the SDPUC's decision denying it ETC status has in effect prohibited it from entering the market. In order to establish any alleged effective prohibition on its ability to provide telecommunications services it is clear that a factual showing of inability is required.

This Commission has made it clear on numerous occasions that preemption under Section 253(a) requires a fact-intensive showing that a particular law, regulation, or legal requirement actually has the effect of prohibiting a telecommunications carrier from providing a telecommunications service.²⁸ Mere allegations that a particular law or regulation may have such an effect are insufficient to satisfy the statutory requirement. As this Commission explained:

[p]arties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records.

²⁷ SDITC argued to the SDPUC in the underlying administrative proceeding that the proposed fixed wireless service would not be exempt under 47 U.S.C. § 332(c)(3) from South Dakota statutes requiring the certification of providers of local exchange services. The SDPUC, in ruling on the request of Western Wireless for ETC designation, did not address this certification issue.

²⁸ See e.g. *Texas Preemption Order*, FCC 97-346, ¶¶ 80-81 (preemption appropriate where AT&T provided actual evidence that the economic impact of the legal requirements would be great enough to prohibit it from providing competitive local exchange service in Texas); *California Payphone Order*, FCC 97-251, ¶¶ 31-35 (denying preemption because petitioner had failed to provide any evidence that city ordinance in fact prohibited it from providing any telecommunications services); *Classic Telephone Order*, FCC 96-397, ¶ 26, released October 1, 1996 (preempting local law because evidence presented by petitioner supported contention that cities implemented the franchise requirements in such way that prohibited petitioner from providing telecommunications services).

TCI Cablevision of Oakland County, Inc.'s Petition for Declaratory Ruling, Preemption and Other Relief, Memorandum Opinion and Order, FCC 97-331, ¶ 101, released September 19, 1997.²⁹

In California Payphone Association Petition for Preemption, *supra*, the California Payphone Association asked for the preemption of a city ordinance which prohibited payphones on private property within the Central Business District of the City of Huntington Park, California, unless the payphones met certain enclosure requirements. The ordinance was challenged under Section 253(a) of the Act as a barrier to entry in the market for payphone services in the City. The California Payphone Association claimed that the ordinance violated Section 253(a) because it prevented them from installing payphones outdoors on the public rights-of-way in competition with the primary provider of payphone services, Pacific Bell. The Commission denied the petition for preemption, concluding that the record did not support a finding that the ordinance “prohibits or has the effect of prohibiting” the ability of any payphone service provider to provide payphone service in the Central Business District.³⁰ Specifically, the Commission found that petitioner failed to show that payphone providers other than Pacific Bell lacked a “commercially viable opportunity” to compete through the provisioning of payphones in accordance with the City’s ordinance.³¹

²⁹ See also, *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petitions for Arbitration*, Memorandum Opinion and Order, FCC 97-362, ¶ 38, released October 8, 1997 (rejecting preemption claim where petitioner “simply asserts that these state legal requirements are barriers to entry, but offers no record evidence to demonstrate that it cannot comply with the requirements”).

³⁰ *California Payphone Order* at ¶ 42.

³¹ *Id.* at ¶ 41; See also ¶ 40, “Even assuming, arguendo, that indoor payphones would generate less revenue than outdoor payphones in the Central Business District, that fact, standing alone, does not necessarily mean that indoor payphones are ‘impractical and uneconomic,’ as argued by CPA. For us to reach such a conclusion, the record would have to demonstrate that indoor payphones in the Central Business District would generate so little revenue as to effectively prohibit the ability of an entity to provide payphone service in the Central Business District. The present record does not contain much relevant information, however, beyond unsupported assertions of the inferiority of indoor payphones vis-a-vis outdoor payphones. . . .”

For the same reason, the Commission here must deny the Western Wireless request for preemption under Section 253(a). Western Wireless repeatedly states in its petition that it will be impossible for it to compete with incumbent local exchange carriers without first being designated an ETC. None of these statements, however, offer any real evidence of economic infeasibility. Western Wireless fails to present any evidence indicating, in fact, that universal service support is necessary in order for it to compete through its fixed wireless services. The record contains no evidence showing either: (1) the specific costs Western Wireless would incur on a per customer or statewide basis to make an offering of its fixed wireless services; or (2) the per customer or statewide revenues the company believes it would need to make such an offering feasible. Without this sort of evidence, it would be improper for this Commission to make any finding relating to the commercial viability of the Western Wireless services. Absent supporting evidence actually establishing an inability to provide service for economic reasons, the Commission must disregard the Western Wireless claims of preemption under Section 253(a).

In addition to the lack of any supporting evidence, there are other reasons to question the validity of the claims by Western Wireless that it has been prohibited from providing its fixed wireless services. As indicated by the SDPUC record, Western Wireless is already providing its cellular mobile services throughout most areas of South Dakota. According to its testimony presented to the SDPUC, it would be using its existing CMRS network as the network infrastructure for its fixed wireless offering. If the existing CMRS network is to be used, why would the fixed wireless offering be so prohibitively expensive? In addition, Western Wireless is already providing its fixed wireless service to customers located in at least one rural exchange in North Dakota. Yet, it has not been designated an ETC by the utility commission in that state.

The statements by Western Wireless that, as a result of the SDPUC decision, it has been shut out from providing its fixed wireless services also assume that in order to enter the market and compete, Western Wireless would have to finance a complete build-out of its own network.

This is not true and the SDPUC's findings do not in any way mandate such a result. The federal ETC provisions allow a company seeking ETC status to provide the required telecommunications services through "either using its own facilities or a combination of its own facilities and resale of another carrier's services . . ."³² In addition, the option of providing the required facilities through the purchase of interconnection and unbundled network services, subject to the rural exemption review process, is available to assist carriers in making an offering of the required ETC services. The SDPUC's decision does not in any way take away these options for providing competitive local exchange services. Western Wireless is free to seek ETC designation in South Dakota using either resale or leased ILEC facilities as a means of supplementing its own network coverage.

Western Wireless makes the statement on page 17 of its petition that the SDPUC would "expect a new entrant to have already deployed network facilities to every home in its service area before it can be declared eligible to receive federal universal service support" This interpretation of the SDPUC decision is ridiculous. It improperly suggests that Western Wireless would not have the option of supplementing its offering through either resale or the leasing of network services from other LECs as a means of obtaining ETC status.

The SDPUC decision merely reflects testimony presented by Western Wireless indicating that it would rely on its own network facilities in order to make an offering of its fixed wireless services.³³ The company did not, at the SDPUC hearing, indicate that it had any resale or interconnection agreements in place with any ILEC, or that it had commenced any negotiations with any ILEC for either resale or interconnection services. Consequently, in reviewing the Western Wireless ETC petition to determine whether there was an "offer" of the required services, the SDPUC looked at the extent to which Western Wireless had a network in place to

³² 47 U.S.C. § 214(e)(1)(a).

provide the services. In seeking preemption of the SDPUC decision, Western Wireless puts great emphasis on the finding by the SDPUC concerning gaps in the company's cellular service coverage in South Dakota. These findings by the SDPUC were appropriate given the statements of Western Wireless that it would be using its existing network to provide the planned universal service offering.

Contrary to what is implied by Western Wireless, the SDPUC did not by its ETC decision impose any network or facility build-out requirements. The SDPUC reviewed the request for ETC status consistent with the ETC designation provisions and its decision in no way supports any claim that the SDPUC effectively established a barrier to competitive entry prohibited by Section 253(a) of the Act.

In The Public Utilities Commission of Texas Petitions for Declaratory Ruling and/or Preemption, supra, this Commission reviewed various provisions of the "Texas Public Utility Regulatory Act of 1995" to determine whether they were prohibited by Section 253(a) of the Act. One of the sections in the Texas law challenged specifically by AT&T Communications as a barrier to competitive entry required competing carriers to provide service within thirty days of receiving a request for service and to offer service to all customers within their certificated areas.³⁴ The Commission declined to preempt these provisions in the Texas law finding that the requirements could be satisfied through resale of incumbent LEC services.³⁵ The Commission concluded that AT&T had not shown that the requirements had the effect of prohibiting an entity from providing telecommunications services as proscribed by Section 253(a). This decision by the Commission also supports a denial of the Western Wireless claim for preemption in this case.

³³ See Western Wireless Petition for Preemption p. 5, "Western Wireless explained that it would provide universal service using its existing cellular network , . . ."

³⁴ *Texas Public Utility Regulatory Act of 1995* §§ 3.2531(c) and 3.258(a).

³⁵ *Texas Preemption Order*, ¶ 98.

2. The SDPUC decision is consistent with the language and intent of Section 214(e).

In the context of reviewing any ETC petition under the ETC criteria set forth in 47 U.S.C. § 214(e), the State Commission should be concerned as to precisely when the carrier applying for ETC status will make its services available to consumers. In order to show that it has made an “offer” of the required services as contemplated under Section 214(e), a carrier petitioning for ETC designation should be able to show that it is in a position to actually provide such services within a reasonable period of time. Obviously, some reasonable parameters must be drawn around the term “offer” as it is used in 47 U.S.C. § 214(e). If no parameters are drawn and a wireless carrier seeking ETC status is able to claim that it offers all the required services before deploying its network or before entering into any necessary resale or interconnection agreements, the provisions of 47 U.S.C. § 214(e) are given little effect. The term “offer” must be interpreted and applied in a manner that will actually work to deliver universal service to end user customers.

In reviewing the Western Wireless ETC request, the SDPUC considered when the company might actually be in a position to provide its fixed wireless services throughout the State. Western Wireless was not, however, able to give the PUC any clear indication of when it would be able to provide its service to customers requesting the service. The company asserted to the SDPUC that it would be able to implement universal service immediately if it were designated an ETC. The evidence actually presented to the SDPUC, however, failed to support this assertion.³⁶

Requiring a showing that carriers applying for ETC status can make their services available to requesting customers within a reasonable time frame is supported by the express provisions of Section 214(e). The provisions of Section 214(e)(1) which require an “offer” of the required services “throughout the service area for which designation is received” do not indicate that it is

sufficient for an ETC to merely show ability to comply at some undetermined future date. Under Section 214(e)(4), specifically, an ETC serving in an area where more than one ETC has been designated is permitted to relinquish its ETC status upon giving advance notice. Section 214(e)(4) states, in part, that [a] State commission shall permit an eligible telecommunications carrier to relinquish its designation as such carrier in any area served by more than one eligible telecommunications carrier.” The relinquishment option provided ETCs under the federal law requires that all carriers designated as ETCs within a service area be positioned to provide their services to any customer within the area.

Western Wireless contends that the SDPUC’s decision is based on a misunderstanding of how a carrier “meets the requirements” of Section 214(e)(1) and as support cites to the FCC’s Report and Order in CC Docket 96-45, In the Matter of Federal-State Joint Board on Universal Service, FCC 97-157, (“Universal Service Order”) released May 8, 1997 and the FCC’s decision in AAD/USB File No. 98, Memorandum and Order, In the Matter of Designation of Fort Mojave Telecommunications, Inc. et al. as Eligible Telecommunications Carriers, DA 98-392, released February 27, 1998. A review of these orders and in particular the entirety of each paragraph cited by Western Wireless indicates that the language relied upon by Wireless is taken out of context. Neither of these Commission decisions offer any support for Western Wireless’s position concerning the Section 214(e) requirements -- that carriers requesting ETC designation need only show “prospective compliance with the requirements.”

Western Wireless first cites to certain language contained in paragraph 137 of the Commission's Universal Service Order, FCC97-157. However, the language cited, set forth on page 13 of the Western Wireless petition for preemption, is clearly taken out of context. A full read of the pertinent paragraph from the Universal Service Order indicates that the Commission, in making the statement cited by Western Wireless, was specifically referencing the continuing

³⁶ SDPUC Order, Finding of Fact 20.

obligation of ETCs, after they are designated, to provide all of the ETC services as a prerequisite to receiving any federal universal service funds. The Commission statement cited by Western Wireless appears in the following text:

Consistent with the findings we make above, we disagree with GTE's assertion that the use of the phrases "a carrier that receives such support and any such support . . ." instead of the phrase "such eligible carrier" in Section 254(e) indicates that Congress intended to require carriers to meet criteria in addition to the eligibility criteria in Section 214(e). We conclude that the quoted language indicates only that a carrier is not entitled automatically to receive universal service support once designated as an eligible telecommunications carrier. For example, a carrier must meet the Section 214(e) criteria as a condition of its being designated an eligible telecommunications carrier and then must provide the designated services to customers pursuant to the terms of Section 214(e) in order to receive support. Indeed, the language of Section 254(e), which states that "only an eligible telecommunications carrier designated under Section 214(e) shall be eligible to receive" universal service support, suggests that a carrier is not automatically entitled to receive universal service support once designated as eligible. . . ."³⁷

Emphasis added.

In stating that a carrier "then must provide the designated services to customers pursuant to the terms of Section 214(e)," SDITC does not believe the Commission intended to suggest that carriers can receive ETC status without showing an actual offering of the required ETC services. The paragraph cited above refers to two different carrier obligations. First, it speaks to the requirement that any carrier seeking ETC designation must show that it meets the Section 214(e) criteria "as a condition of ETC designation." Secondly, it refers to the requirement imposed on every ETC, after designation, to continue offering all of the required ETC services as a condition to receiving any federal universal service funds.

Contrary to what Western Wireless apparently believes, the Commission has never suggested that carriers can meet the ETC service requirements without showing that they are actually offering the required services. The Commission instead has clearly indicated that a

³⁷ *Universal Service Order*, FCC 97-157, par. 137.

current offering of the services is required. “[A] carrier must meet the Section 214(e) criteria as a condition of its being designated an eligible telecommunications carrier”³⁸

The Fort Mojave decision also cited by Western Wireless addressed several applications for ETC status submitted to the Commission by companies not subject to state commission jurisdiction. Paragraph 11 from that decision, DA 98-392, relied upon by Western Wireless reads as follows:

Based on the uncontested record before us, we find that, subject to the extension of time granted above, each of the petitioners offers, or will be able to offer all of the services designated for support by the Commission. We therefore conclude that each of the petitioners complies with the requirements of Section 214(e)(1)(A) to “offer the services that are supported by the Federal universal service support mechanisms under Section 254(c).”

The above language does not support the interpretation of Section 214(e) that is proffered by Western Wireless. The Commission granted an extension of time to the carriers pursuant to 47 C.F.R. § 54.101(c) for “toll-limitation” services. It was in specific reference to this extension of time that the Commission concluded that the petitioning carriers offer or “will be able to offer” all of the federally supported services. The use of these words, in the context of referencing an extension of time from one of the ETC service requirements, should not be interpreted to mean that the Commission no longer requires carriers to show that they in fact are offering all of the federally supported services and that they actually “meet” the ETC service requirements. The very fact that the Commission rules relating to ETC designation incorporate a process for seeking time extensions for meeting certain ETC service requirements plainly illustrates that the provisions of Section 214(e) are intended to require a present offering of the supported services before ETC designation can be granted. If this were not intended, why did the Commission adopt specific rules permitting extensions of time from having to provide single party service, access to enhanced 911 service, or toll limitation service?

³⁸ Id., See also 47 C.F.R. 54.101 (b).

Paragraph 13 of the Fort Mojave decision is also relied upon by Western Wireless. This paragraph also provides no support for GCC's position that carriers are not required to actually offer all of the ETC services prior to receiving ETC designation. It is limited to addressing the advertising requirement contained in Section 214(e)(1)(B) of the Federal statute.

To support its distorted view of the Section 214(e) ETC requirements, Western Wireless also attempts to draw an analogy between the Commission's decision in Application of SBC Communications, Inc. et al., Memorandum Opinion and Order, FCC 97-228 ("SBC Oklahoma 271 Order"), released June 26, 1997 and the ETC designation issue presented in this case. In response, SDITC does not believe that any valid comparisons can be made between the two separate processes – the process for designating eligible telecommunications carriers for universal service purposes under Section 214(e) vis-a-vis the process for permitting Regional Bell Operating Company entry into interLATA markets under Section 271. Moreover, even if the Commission chooses to consider its SBC Oklahoma 271 Order, SDITC believes the Order lends greater support to the SDPUC's decision in this case. The Commission in its SBC Oklahoma 271 Order first addressed the question of whether SBC Communications should be permitted entry into the interLATA services market under the provisions of Section 271(c)(1)(A) of the Act, which is commonly referenced as the "Track A" method of meeting the Section 271 requirements. The key issue addressed by the Commission in its Track A analysis was whether there was "a competing provider of telephone exchange services to both residential and business subscribers within SBC Communication's service area."³⁹ In ruling on this issue, the Commission concluded that a "competing provider" of telephone exchange services could not "mean a carrier . . . that at present has in place at most paper commitments to furnish service."⁴⁰ The Commission found that the term "competing provider" in Section 271(c)(1)(A) "suggests that

³⁹ SBC Oklahoma 271 Order, ¶ 6.

⁴⁰ Id., ¶ 14.

there must be an actual commercial alternative to the BOC in order to satisfy section 271(c)(1)(A). ”⁴¹ *Emphasis added.* The “competing provider must actually be in the market, and therefore beyond the testing phase.”⁴² These findings of the Commission are consistent with the decision made by the SDPUC on Western Wireless' request for ETC designation. The SDPUC required as a precondition to any ETC designation that Western Wireless show an actual offering of the required services. In arguing its point, Western Wireless conveniently chooses to disregard these findings within the SBC Oklahoma 271 Order.

There is absolutely no support for the Western Wireless claim that carriers requesting ETC status can satisfy the Section 214(e) requirements by simply promising prospective compliance. The Federal ETC provisions and the related Commission rules require a carrier to presently “meet” the universal service requirements, not to predict that it will meet the requirements after it receives ETC designation and is offered universal service support.

The claims made by Western Wireless concerning the SDPUC’s decision ignore the specific language applicable to ETC designations set forth in Section 214(e) subsections (1) and (2) and trivialize federal universal service goals. If Western Wireless believes carriers should be granted ETC status based merely on statements of an intention to provide service, the provisions of Sections 214(e) are effectively rendered meaningless. The process for granting ETC designations is one of the tools established by Congress for ensuring that universal service is actually preserved as competition is introduced. It is an important process that should not be minimized or discarded through any loose or weak interpretation of the Section 214(e) language.

⁴¹ Id.

⁴² Id., ¶ 17.

3. The SDPUC decision is consistent with the provisions of Section 253(b).

Given that the SDPUC decision does not violate the provisions of Section 253(a) of the Act, it is unnecessary to review the decision for purposes of determining whether it meets the standards set forth in Section 253(b).⁴³

SDITC does, however, challenge the Western Wireless claims that the decision is not competitively neutral and violates universal service principles.

First, in response to the claim that the decision is not competitively neutral and discriminates against competing local exchange carriers, it should be noted that the SDPUC did not interpret or apply the provisions of Section 214(e) any differently when ruling on ILEC ETC designations. All of the ILECs were required to seek ETC designation from the SDPUC before they could be eligible for any federal universal service support. The SDPUC required separate ETC applications from each of the ILECs and only granted ETC designations after finding that each of the companies “currently provides and will continue to provide” the various essential services listed in 47 C.F.R. § 54.101 “throughout its service areas”.⁴⁴ For the “toll control” service earlier required under the FCC rules, the ILECs were required to apply for a temporary waiver of such requirement pursuant to 47 C.F.R. § 54.101(c). The waiver requests were granted by the SDPUC, upon its specific finding that the companies were faced with exceptional circumstances concerning their ability to make the required service available.⁴⁵ Thus, the ILECs were not held to any lesser standard in applying for ETC status and were required to show an actual offering of all of the required telecommunications services.

⁴³ See e.g. *California Payphone Order*, ¶ 25.

⁴⁴ See e.g. *In the Matter of the Filing by Tri-County Telecom, Inc. for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, Finding of Fact XX, SDPUC Docket TC97-105, dated December 17, 1997.

⁴⁵ *Id.* at Finding of Fact XXI.

The fact that Western Wireless could have pursued ETC status through using the resale or lease of network services from other carriers to supplement its fixed wireless offering further precludes any finding that the SDPUC's decision is not competitively neutral. As earlier explained, Western Wireless may obtain ETC status by offering the required ETC services through its own facilities or a combination of its own facilities and the resale and/or lease of facilities from other carriers. Specifically, Western Wireless could seek to resell or purchase unbundled network services from ILECs in those particular areas or at customer locations that it believes may be too expensive to serve through its own facilities. Under these circumstances, certainly, Western Wireless is no more burdened by the requirement of showing an actual or current offering of the required ETC services than any of the incumbent local exchange carriers.

Next, in arguing that the SDPUC's decision is inconsistent with universal service principles and therefore contrary to Section 253(b), Western Wireless seems to equate customers having a choice among local exchange carriers with universal service. This is clearly not the focus of the universal service provisions in the Act. The purpose of the universal service provisions is not to ensure that all customers have a choice of providers, but rather to ensure that all customers have affordable access to a basic, evolving level of telecommunications services. The SDPUC's decision denying Western Wireless ETC status cannot be judged to adversely impact universal service objectives as they are established under the federal law.

Payments to ETCs under the present federal funding mechanisms for high-cost loop support are based on the number of lines served within an established service area or "study area." Universal service support is paid on an average per line basis. Even though the universal service support payments are averaged, the actual costs of serving individual customer lines within any single service area are obviously different. If a competing carrier designated as an ETC is not required to make a current offering throughout the ILEC service area to all end-user customers, the carrier is in a position to arbitrage the federal support mechanisms by limiting its

offering to only the lowest cost customers. The competing carrier receives a windfall through the federal support mechanisms and the ILEC loses support but is still left with the obligation to provide service to all high-cost customers in the service area. To the extent that the SDPUC's decision prevents this from occurring, it is consistent with universal service objectives in the federal law.

Lastly, with respect to rural service areas in particular, the decision denying Western Wireless cannot be viewed as a violation of the Section 253(b) standards because of the provisions found in Section 253(f) of the Act. Section 253(f) states in pertinent part:

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.

Emphasis Added.

Section 253(f) gives State Commission's specific authority to impose ETC service requirements on any carrier that seeks to provide local exchange services in rural telephone company service areas.⁴⁶ Its obvious goal is to prevent competitors from "cherry-picking" among customers in rural service areas.

Clearly in view of Section 253(f) there is no justification for any claim that the SDPUC, in requiring that Western Wireless show an actual offering of service, violated either the provisions

⁴⁶ South Dakota Law includes a similar statute. That statute, South Dakota Codified Laws § 49-31-73, provides in pertinent part: "Except as provided in 47 U.S.C. § 253(f) as of January 1, 1998, if the applicant proposes to provide any local exchange service in the service area of a rural telephone company, the applicant is required to satisfy the service obligations of an eligible telecommunications carrier as set forth in 47 U.S.C. § 214(e)(1) as of January 1, 1998, within a geographic area as determined by the commission. In addition, the services required to be provided as set forth in 47 U.S.C. § 214(e)(1) as of January 1, 1998, shall be provided at prices and on terms which reflect a good faith offering of the services throughout the service area of the incumbent rural telephone company. This includes the obligation to advertise the availability of local exchange services and prices to potential customers throughout the service area using media of general distribution. . . ."

of Section 253(a) or 253(b) of the Act. The Commission, in its Texas Preemption Order, ¶99, concluded that Section 253(f) of the Act is “a savings clause which preserves from preemption state or local requirements that may otherwise violate Section 253(a).” If SDPUC action consistent with Section 253(f) cannot be found to violate Section 253(a), it also must pass muster under Section 253(b).⁴⁷

D. Preemption is not otherwise supported by any conflict between the SDPUC Order and federal purposes and objectives.

As a second ground for preemption, Western Wireless alleges that the SDPUC decision denying it ETC status conflicts with or “thwarts and impedes the accomplishment of the federal interest in promoting local competition in rural and high-cost areas.”

In cases where a conflict of laws is alleged, the U.S. Supreme Court has firmly established the criterion for determining whether state and federal laws are so inconsistent that the state law must give way. The task is to determine whether under the circumstances of the particular case, the state’s law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁸

In regard to this second claim of preemption by Western Wireless, there is clearly no conflict between the SDPUC decision and the federal law that supports such a claim.

1. The U.S. Fifth Circuit Court of Appeals decision in Texas Office of Public Utility Counsel, et al. v. FCC precludes any possible conflict.

⁴⁷ Western Wireless states in a footnote contained in its petition for preemption that Section 253(f) has no bearing in this case because it does not apply to CMRS services. SDITC disagrees. As SDITC argued to the SDPUC, the fixed wireless services planned for the Western Wireless service offering do not fall under exemption from state entry or rate regulation provided under 47 U.S.C. § 332(c)(3). Because they are not subject to this exception, they would be subject to the provisions of Section 253(f).

⁴⁸ *Jones v. Rath Packing Co.*, 430 U.S. 519 at 526 (1977) [citations omitted].

First, there is no cause for alleging preemption based on a conflict between the SDPUC decision and provisions of the Act given the recent U.S. Fifth Circuit Court of Appeals decision in Texas Office of Public Utility Counsel, et al. v. FCC, No. 97-60421, issued July 30, 1999. In this very recent case, the Fifth Circuit Court reversed that portion of the Commission's Universal Service Order, FCC 97-157, which prohibited the states from imposing any additional requirements when designating carriers as eligible for federal universal service support. The Fifth Circuit Court specifically stated:

[n]othing in the statute [47 U.S.C. § 214(e)(2)], under this reading of the plain language speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers. Thus, the FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of *how many* carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements.

The Western Wireless claims of preemption are based on the premise that the SDPUC misinterpreted the provisions of Section 214(e) of the Act and imposed criteria for designation not referenced in either the federal statute or FCC rules implementing that statute. Even if it were determined in this proceeding that the SDPUC imposed some requirement on Western Wireless which goes beyond the federal law, there would be no grounds for preempting the SDPUC decision. State commissions, based on the Fifth Circuit Court's decision, clearly have the authority to impose additional criteria on any carriers requesting ETC status.

The Fifth Circuit Court decision demands a dismissal of the Western Wireless petition for preemption because it eliminates any possibility of finding a conflict between the SDPUC's decisions and provisions in the federal law. Also, the Court's decision raises an issue as to whether this matter is even ripe for a Commission decision on the preemption issues since the SDPUC has never addressed a Western Wireless petition for ETC designation under the Fifth Circuit Court's interpretation of the federal ETC provisions. Rather than continuing with these

preemption proceedings, if Western Wireless still wishes to be designated an ETC anywhere in South Dakota, it should proceed to submit to the SDPUC a new petition for ETC status. Even if this Commission were to determine somehow that the SDPUC's decision under review should be preempted, the SDPUC would have to be given an opportunity to address the Western Wireless ETC request in a manner consistent with the Fifth Circuit Court's decision.

2. In any event, the SDPUC's decision does not "thwart or impede" federal purposes and objectives under the Act.

In any event, aside from any effect that the Fifth Circuit Court's decision has on this proceeding, there is no merit to the claims of Western Wireless that the SDPUC decision conflicts with or, in Western Wireless' words, "thwarts and impedes" federal goals.

As earlier explained herein, the SDPUC decision is consistent with the language and intent of Section 214(e) and other provisions related to universal service found in the Act. Western Wireless attempts to build a conflict between the SDPUC decision and federal law by glossing over the real purpose of the federal ETC provisions.

Contrary to what Western Wireless believes, the purpose of the Section 214(e) provisions is not to assure all competing carriers ETC status and access to federal universal service funding. Western Wireless seems to assert an absolute right to ETC designation in all markets without regard to what impact any such designation may actually have on universal service. The federal law does not support this position. The law does not presume, as Western Wireless presumes, that universal service support should be available to any requesting carrier. The provisions of Section 214(e) relate specifically to universal service, not competition, and are intended to provide universal service support to only those carriers which actually take on universal service responsibilities and make their services available to all customers.

The provisions of Section 214(e) must be applied and interpreted in a manner consistent with actually achieving the federal universal service goals. Accordingly, the SDPUC in

reviewing the Western Wireless petition interpreted the federal ETC provisions to require, in fact, an “offer” of all of the required ETC services throughout the relevant ILEC service areas. The SDPUC’s decision, as such, is entirely consistent with and does not conflict with the federal law.

Western Wireless elevates pro-competitive objectives over and above universal service objectives that are established as equally important purposes under the Act. In looking to whether or not the SDPUC interpreted and applied Section 214(e) consistent with other provisions of the Act, since Section 214(e) relates specifically to federal universal service support, preserving universal service, not promoting competition, should be the primary concern. Western Wireless suggests that the designation of more than one ETC in rural and high-cost areas is necessary for universal service purposes. This suggestion is in direct conflict with the provisions of Section 214(e)(2) which require that before any State Commission may designate more than one ETC within any service area served by a rural telephone company, it must find that designating an additional ETC in such service area would be in the public interest. This additional public interest test, applicable to rural telephone company service areas, recognizes the different economies and costs faced by rural carriers in providing service and reflects a concern on the part of Congress that designating more than one ETC in rural service areas, with the resulting sharing of any available universal service funding, may be counterproductive to preserving and advancing universal service.

Western Wireless, to support its claim that there is a conflict between the SDPUC’s decision and the federal law, distorts the purpose of federal ETC provisions. Western Wireless views the ETC designation process as a means of fostering competition in rural areas. SDITC does not share this view. Neither Section 214(e) nor Section 254 of the Act should be interpreted as a means of subsidizing competitive entry into rural areas that may not at this time efficiently support more than one provider of telephone services. The entry of other providers should be in

response to economic realities in the marketplace and not based on federal universal service subsidies.

Western Wireless further attempts to establish a conflict between the SDPUC's decision and the federal law by arguing that the SDPUC established certain additional criteria for ETC designation beyond the criteria set forth in Section 214(e) of the Act and under the FCC rules. In response, first, SDITC disagrees with the claim that the SDPUC established any additional ETC designation criteria. A fair review of the SDPUC's decision indicates that no additional criteria were imposed.

The SDPUC considered evidence related to pricing in making its decision, but the evidence was considered in a very limited manner, only in the context of determining whether the company had a viable financial plan for making a statewide offering of its services. The SDPUC did not in any way, as Western Wireless suggest, establish "price comparability" with the ILEC as a "criteria" for ETC designation.

The SDPUC also did not in reviewing Western Wireless' mobile cellular service to determine whether it included a certain amount of free local usage establish any new ETC requirement. In finding that the mobile cellular service did not meet all of the ETC service requirements, the SDPUC in part concluded that the service did not offer a certain amount of free local usage in compliance with 47 C.F.R. § 54.101(a)(2).⁴⁹ Western Wireless argues that this determination by the SDPUC resulted in additional ETC criteria, citing to the fact that this Commission has not yet determined specifically the minimum number of local minutes that must be offered by ETCs to consumers free of per minute charges. Apparently, Western Wireless believes that because the FCC has not yet established a minimum local usage standard that it has no obligation to comply with the provisions of 47 C.F.R. § 54.101(a)(2).

SDITC disagrees. The “local usage requirement” set forth in the federal rules should not be completely ignored simply because no minimum standard has yet been established by the Commission. The intent of the “local usage requirement” is to ensure that all ETCs make a certain amount of local usage available to local exchange customers at an affordable price. The SDPUC, in previously granting ETC designations to ILECs in South Dakota, insisted on compliance with the local usage requirement. The SDPUC was aware from local rate information routinely gathered from these carriers that they were offering unlimited local usage at flat, affordable, monthly rates. Thus the SDPUC was able to conclude based on this information that the ILECs were meeting the local usage requirement established by 47 C.F.R. § 54.101(a)(2). Western Wireless provided the SDPUC with no evidence to conclude that it was offering any amount of local usage free of per minute charges.

Western Wireless was obligated to show some level of compliance with the “local use requirement.” No waiver process relating to such requirement is provided for under the FCC rules. The SDPUC proceeded by applying the federal rules as written and properly concluded that Western Wireless had not met the requirement in 47 C.F.R. §54.101(a)(2). It did not, as Western Wireless contends, impose any additional ETC requirement.

In any event, as earlier noted, even if it could be established that the SDPUC considered criteria beyond those presently established in the federal law, it would be improper to determine that the SDPUC’s decision is conflicting with the federal law. The U.S. Fifth Circuit Court of Appeals in Texas Office of Public Utility Counsel, et al. v. FCC, No. 97-6042, has held that state utility commissions may prescribe additional criteria relating to ETC designations.

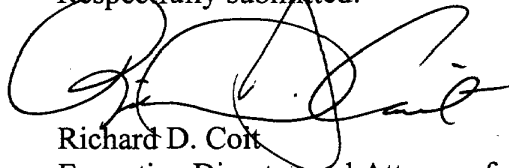
⁴⁹ 47 C.F.R. § 54.101(a)(2) provides: “Local usage. ‘Local usage’ means an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end user customers.”

V. CONCLUSION

Based on all of the foregoing arguments and authorities, SDITC urges the Commission to dismiss the Western Wireless petition for preemption of the SDPUC's Order. The Western Wireless claims of preemption are based on nothing more than its misrepresentations and exaggerations of the SDPUC Order and are not supported by either the facts presented or the federal law.

Dated this 31st day of August, 1999.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Richard D. Coit', is written over the printed name.

Richard D. Coit
Executive Director and Attorney for SDITC

**Members of the South Dakota
Independent Telephone Coalition**

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Armour Telephone Company
Baltic Telecom Cooperative
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Bridgewater-Canistota Independent Tele.
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CERTIFICATE OF SERVICE

I hereby certify that an original and four (4) copies of the foregoing document were sent via Federal Express on the 31st day of August, 1999 to:

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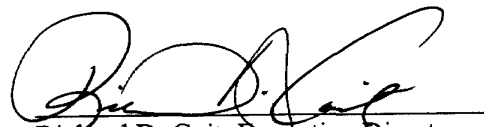
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